

United States Citizenship in Puerto Rico, A Short History

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Executive Summary

The Puerto Rican legislature enacted Law 191 in December 2009 to authorize the issuance of a new birth certificate to all persons born in the island of Puerto Rico. Law 191 will invalidate all birth certificates issued to persons born in the island. On July 1, 2010 the Office of Demographic Registry for the Puerto Rican Health Department will begin issuing new birth certificates to persons born in the island. The new birth certificates incorporate new technologies that are designed to combat fraud and protect the identity of all United States citizens born in the island of Puerto Rico

Today the United States (U.S.) recognizes four types of citizenship. Congress can create laws that authorize the naturalization of individual immigrants or groups of people. Congress can also enact legislation that recognizes the *jus sanguinis* or derivative parental right of a child to acquire U.S. citizenship if born outside of the United States. Any person born *in* the United States is entitled to the right to acquire citizenship at birth. And Congress can create special statutory forms of citizenship to govern particular populations in discriminatory ways.

Since the United States acquired Puerto Rico in 1898, Congress has extended at least three forms of citizenship to persons born in Puerto Rico:

- A Puerto Rican citizenship under the terms of Section 7 of the *Foraker Act of 1900*. This form of citizenship was subsequently deemed to have been tantamount or equal to a form of U.S. nationality.
- A derivative or parental form of *jus sanguinis* (bloodright) citizenship under the terms of Section 5 of the *Jones Act*.

- A birthright or *jus soli* form of citizenship under the terms of the *Nationality Act of 1940* available to persons born in Puerto Rico after 1941.

Because Congress has never enacted legislation to incorporate Puerto Rico as a territory of the United States, questions remain whether the form of birthright or *jus soli* citizenship that extends to persons born in Puerto Rico is constitutional or statutory in nature.

About this Report

This report provides a short history of the extension of United States citizenship to Puerto Rico and persons born in the island. The report documents relevant legislation and legal opinions.

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Introduction

The Puerto Rican legislature enacted Law 191 in December 2009 to authorize the issuance of a new birth certificate to all persons born in the island of Puerto Rico. Law 191 will invalidate all birth certificates issued to persons born in the island. On July 1, 2010 the Office of Demographic Registry for the Puerto Rican Health Department will begin issuing new birth certificates to persons born in the island. The new birth certificates incorporate new technologies that are designed to combat fraud and protect the identity of all United States citizens born in the island of Puerto Rico.¹

The state of Connecticut's Latino and Puerto Rican Affairs Commission (LPRAC) has initiated an information campaign designed to assist Puerto Ricans in the process of acquiring new birth certificates. This information campaign aims to provide clear and forthright information to the public that can facilitate a better understanding of this process.

This short report provides an introduction to the history of the extension of United States citizenship to Puerto Rico and persons born in the island. As Puerto Ricans and others contemplate the importance of acquiring a new birth certificate that guarantees the right to birthright or *jus soli* citizenship to persons born in the island of Puerto Rico, it may be of interest to further understand the historical nature of this form of citizenship. The report begins with an outline of the major forms of citizenship that have been used in the United States. This outline is followed by a short description of the various forms of nationality and citizenship that the Federal government has extended to Puerto Rico and its residents since 1898, the year that the United States acquired the island. The report concludes with

¹ For more information visit the website for the Puerto Rican Department of Health at: <http://www.salud.gov.pr/Programas/RegistroDemografico/Pages/NuevosCertificadosdeNacimiento-English.aspx>, or the Puerto Rico Federal Affairs Administration at: <http://www.prfaa.com/>. Alternatively, more information can be obtained by calling the Latino and Puerto Rican Affairs Commission at (860) 240-8330.

a brief comment suggesting possible questions of interest that are connected to the extension of United States citizenship to Puerto Rico.

Citizenship and the United States Constitution

The concept of citizenship has traditionally served to define the membership or relationship between persons and their political communities. Different political communities have often developed different types of citizenship to recognize various differences and/or similarities among their members. Broadly speaking, the United States has used at least five types of citizenship to classify its members. These types of citizenship include two constitutional forms of citizenship, two types of statutory or legislative citizenship and a state-based form of citizenship.

Article I, Section 8, Clause 4 and the first sentence of the 14th Amendment of the Constitution authorize Congress to “establish an uniform rule of naturalization.” This means that Congress has the power to enact legislation that can provide for the naturalization or the extension of citizenship to persons born outside of the United States. In some cases Congress has enacted legislation that authorized individual immigrants to become citizens, and in other cases it has collectively naturalized groups of people.

Congress has also developed a legislative form of derivative or parental citizenship modeled after the Roman tradition of *jus sanguinis* or blood right. Early *jus sanguinis* citizenship was enacted to extend rights and responsibilities to the children of members or the armed forces and embassy staff serving overseas or outside of the United States. For most of its history, this form of parental citizenship required that children the children of citizens born outside of the United States had to reside for a portion of their life in a state or territory within the Union in order to acquire United States citizenship rights. Although the Constitution does not contain any language authorizing the extension of parental or *jus sanguinis* citizenship, the

Supreme Court has consistently affirmed the power of the Congress to develop the necessary legislation to extend this form of citizenship.

Throughout history, the United States has recognized two forms of birthright citizenship, namely a state-based and a national form of citizenship. Prior to the enactment of the 14th Amendment in 1868, the children of citizens, or in some cases the children of persons entitled to citizenship, born in the individual states acquired a form of state citizenship that was equivalent to a national citizenship. Although each state enacted different citizenship laws, with some notable exceptions states generally extended citizenship rights to White males born in their state. Before Congress enacted the 14th Amendment the Supreme Court generally recognized this form of state-based citizenship as a form of United States citizenship.

Following the Civil War Congress enacted the 14th Amendment to extend citizenship rights to liberated slaves. This amendment essentially served to create a national citizenship based on the principles established in the Civil Rights Act of 1866 [14 Stat. 27 (1866)]. The first sentence of Section 1 established that all “persons born or naturalized *in* the United States, and subject to the jurisdiction thereof, are citizens of the state wherein they reside.” This new amendment sought to replace the state-based form of citizenship and created a national citizenship that was based on the principle of birthright in the United States. The 14th Amendment extended to the individual states, territories, and districts that comprised the United States. In 1898, the Supreme Court ruled in *United States v. Wong Kim Ark* (169 U.S. 649) that any person born in the United States, regardless of the citizenship or legal status of their parents, was entitled to birthright citizenship rights under the 14th Amendment. Today, any person born *in* the United States is entitled to this form of birthright or *jus soli* citizenship.

Congress has also created a series of “statutory” or legislative citizenships that have been applicable to particular groups of people residing in the United States. These forms of citizenship have been designed to govern particular groups of people in strategic and discriminatory ways. Statutory forms of citizenship have

been used to extend or withhold different types of constitutional rights to groups of people living under the sovereignty of the United States. Most notably the United States government has used this type of citizenship to govern Native Americans and the U.S. citizens residing in unincorporated or outlying territories such as Guam, American Samoa, the Northern Mariana Islands, the U.S. Virgin Islands, and most would argue Puerto Rico. The Supreme Court has historically affirmed the power of Congress to create these types of statutory citizenship.

Today the United States recognizes four types of citizenship. Congress can create laws that authorize the naturalization of individual immigrants or groups of people. Congress can also enact legislation that recognizes the *jus sanguinis* or derivative parental right of a child to acquire U.S. citizenship if born outside of the United States. Any person born *in* the United States is entitled to the right to acquire citizenship at birth. And Congress can create special statutory forms of citizenship to govern particular populations in discriminatory ways.

United States Citizenship and Puerto Rico

The United States has extended at least three types of citizenships to Puerto Ricans living in the island since 1898. The Federal government has recognized a United States nationality (after April 11, 1899); a Puerto Rican citizenship (1900-present); a parental or derivative form of *jus sanguinis* citizenship (1917-1950); and a birthright or *jus soli* citizenship (1941-present). These forms of citizenship, however, have been contingent or dependent on the unincorporated territorial status of Puerto Rico, a constitutional status that has not changed since the Supreme Court invented this new constitutional status in the *Insular Cases* of 1901.

General Nelson A. Miles took control of the island of Puerto Rico on July 25, 1898 amidst the Spanish-American War. At the time Puerto Rico was considered to be a Spanish province or *colonia de Ultramar*. The residents of the island were recognized as Spanish citizens and subjects of the Spanish crown. During the early

occupation and until the ratification of the 1898 Treaty of Peace on April 11, 1899 [30 Stat. 1754 (1899)], the United States government treated inhabitants of Puerto Rico as Spanish subjects and foreign nationals under military occupation.

The Treaty of Paris of 1898 ceded Guam, the Ladrones Islands, Puerto Rico and the Philippines to the United States. The Treaty of Paris recognized two possible nationalities in Puerto Rico, namely that of the Spanish nationals, who were born in the Spanish peninsula, and the Puerto Rican nationals, or those who were born on the island. Spanish nationals were given the opportunity to either retain their Spanish nationality or adopt the newly created Puerto Rican nationality. Article IX of the Treaty of Paris further stipulated that:

In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

Unlike previous treaties of territorial acquisition that either naturalized or promised to naturalize the inhabitants of the acquired territories, the Treaty of Paris created a new form of nationality that was neither Spanish nor Anglo-American. Puerto Ricans ceased to be Spanish subjects but did not become United States citizens.

This article further empowered Congress to determine the civil and political rights of island's residents. The Federal government subsequently argued that the latter provision of Article IX gave Congress an almost absolute or plenary authority to treat Puerto Rico and the other former Spanish colonies differently than all other territories acquired prior to the Spanish-American War of 1898. The Federal government argued that the Treaty of Paris gave Congress a power to govern Puerto Rico differently than other territories that was not limited by the Constitution, a power to govern that was based on Article IX of the treaty.

Following the Spanish-American War and the cessation of hostilities, the President appointed a succession of military governors to rule the island until 1900 when Congress enacted a civilian government under the terms of the *Foraker Act* [31 Stat. 77 (1900)]. The military governors were tasked with preparing Puerto Rico to either become a territory of the United States or to become an independent nation. During this period, between the ratification of the Treaty of Paris on April 11, 1899 and April 30, 1900 when the *Foraker Act* took effect, Puerto Ricans were treated as U.S. nationals.

Unlike prior organic or territorial acts that treated acquired territories as future states-in-the-making, the *Foraker Act* treated Puerto Rico as an occupied territory that was not a foreign country or a part of the United States. The *Foraker Act* contained a provision that extended a special tax on commercial goods or products that were imported from the island into the United States. Although this provision had been designed as a temporary measure to generate revenue for the governance of the island, it became a central point of contention because it neglected to treat Puerto Rico as an integral part of the United States for commercial purposes. The *Foraker Act* tariffs treated Puerto Rico as a foreign port in a domestic sense.

Congress also refused to extend U.S. citizenship to Puerto Rico and created a legislative or statutory form of citizenship specifically designed for the residents of the island. The invention of this new citizenship, a citizenship that did not exist in the Constitution, represented a complete departure from prior precedents. Historically the United States had either naturalized the inhabitants of organized territories or promised to do so eventually. Even when the United States acquired other Spanish (e.g. East and West Florida) and later Mexican (e.g. Texas, California, New Mexico, Arizona, Colorado, and Nevada) territories, Congress naturalized the inhabitants of the colonized territories. Section 7 of the *Foraker Act* established that all Spanish subjects and their children born after April 11, 1899 would now become the “People of Puerto Rico.” The Puerto Rican citizenship was formally adopted on

May 1, 1900 and as Antonio Fernós has noted, it has never been abolished. In fact, the United States Code continues to list Section 7 of the *Foraker Act* as a Puerto Rican citizenship [48 U.S.C 733 (a)]. Persons born after April 11, 1899 and until the enactment of the Jones Act in 1917 became Puerto Rican citizens.

The Puerto Rican citizenship created an additional problem for the residents of the island. Under existing immigration laws a person seeking to become a U.S. citizen had to renounce his allegiance to his nationality or citizenship in order to acquire a U.S. citizenship. Because Puerto Ricans could not renounce a foreign citizenship or nationality they became incapable of acquiring a U.S. citizenship. Yet, foreigners residing in Puerto Rico could apply for U.S. citizenship and begin the process of naturalization while residing in the island.

The Supreme Court addressed the constitutionality of the *Foraker Act* tariffs in 1901 with a series of opinions known as the *Insular Cases*. The *Insular Cases* established the constitutional status of Puerto Rico that has defined the relationship between the United States and the island for more than a century. Central to these cases was the constitutional status of the island for the purposes of collecting federal taxes on products imported from Puerto Rico into the United States. The original purpose of the temporary tax was to generate revenues to subsidize the expenses relating to the occupation of the island. Puerto Ricans argued that the imposition of taxes on commercial goods violated a well-established principle of uniform commercial trade among the states and territories that comprised the United States. The reigning interpretation established that no state or territory could levy a tariff on commercial products that were transported from other states or territories within the United States. Puerto Ricans argued that the imposition of tariffs and taxes on products shipped from the island was discriminatory. In a complicated, and contradictory, series of opinions the Supreme Court established that Puerto Rico had become a territory of the United States during the military occupation and thus the tariffs collected during this period were unconstitutional. However, the Supreme Court argued in *Downes v. Bidwell* [182 U.S. 244 (1901)],

Congress had changed the legal status of Puerto Rico with the *Foraker Act*. According to a majority of the judges Puerto Rico became an unincorporated territory, or a territorial possession that was not ready to be placed on a path to statehood.

Unlike territories that were placed on a path to become states unincorporated territories occupied a status somewhere in between a foreign country and a territory, they could be treated as foreign places in a domestic sense. Until Congress enacted legislation to incorporate Puerto Rico, something that Congress has not done in more than a century, the island could be subject to the discriminatory application of the law. This means that although some basic or “fundamental” constitutional extended to the island, Congress could select which constitutional provisions to extend and which to withhold. For example, neither Congress nor the Supreme Court has ever extended the 14th Amendment to Puerto Rico. The original logic adopted by the Supreme Court and the majority of members of the Congress “established” that Puerto Ricans were an inferior race and thus not capable of assuming the responsibilities that came with an Anglo-American constitutional system of government. Puerto Ricans, the justices concurred, were unprepared exercise the responsibilities of territorial self-government. The Court adopted the doctrine of “separate and unequal” to govern Puerto Rico.

In summary, the *Insular Cases* established that Puerto Rico could be treated as an unincorporated territory because the population of the island was racially inferior and unfit to share in the rights and responsibilities of the United States. More importantly, majority opinion written by Justice Henry Billings Brown, the same judge who wrote the infamous decision *Plessy v. Ferguson* [153 U.S. 537 (1896)], also argued that the United States was only comprised of states and that territories, incorporated or otherwise, were located outside of the United States for constitutional purposes. Although it is true that Judge Brown stood alone in making this interpretation, the U.S. government subsequently accepted this argument. One of the key implications of this latter argument is that persons born *in* Puerto Rico

are not necessarily born *in* the United States for the purposes of the 14th Amendment because they are born in a territory that is foreign in a domestic sense.

In 1904 the Supreme Court addressed the question of the constitutional status of the Puerto Rican citizenship in *Gonzales v. Williams* [192 U.S. 1 (1904)]. This case arose from an habeas corpus appeal by Isabella Gonzales, an “unmarried” Puerto Rican woman who had been detained in the Port of New York in 1902 by the Immigration Commissioner while attempting to enter the United States as an “alien immigrant” who, according to immigration officials, “was likely to become a public charge.” The Court, however, concluded that the Puerto Rican citizenship created by the *Foraker Act* was tantamount or equal to a U.S. nationality (not to be confused with a United States citizenship) and therefore Puerto Ricans should not be treated as aliens.

Two years later, in 1906, Congress established an exception for Puerto Ricans in the new immigration law that created the Bureau of Immigration and Naturalization [34 Stat. 596 (1906)]. Section 30 of the new immigration law stated included a modification that extended to all persons owing allegiance to the U.S. who were not citizens at the time:

The applicant shall not be required to renounce allegiance to an foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; *and residence within the jurisdiction of the United States, owing such permanence allegiance, shall be regarded as residence within the United States within the meaning of the five year's clause of the existing law.*

The problem with this exception, Reece Bothwell noted, was that residence within the jurisdiction of the United States did not include Puerto Rico. Although Puerto Ricans were no longer required to renounce a nationality in order to apply to become citizens of the United States, they were still required to reside in a state or territory in order to complete the naturalization process. Bothwell further

documents that this provision did not apply to foreigners residing in Puerto Rico who could obtain U.S. citizenship while residing in the island.

For more than a decade after the enactment of the latter immigration law, the Federal government classified all persons born in the island as Puerto Rican citizens or U.S. nationals. Despite repeated efforts by some congressional leaders to collectively naturalize the inhabitants of the island the majority of legislators were opposed to extending citizenship to Puerto Ricans because of their “inferior” racial heritage.

Nearly two decades after the United States acquired Puerto Rico, Congress enacted a second organic or territorial act generally known as the *Jones Act of 1917* [39 Stat. 951 (1917)]. Section 5 of this organic act collectively naturalized all persons born in Puerto Rico and extended a derivative form of parental or *jus sanguinis* citizenship to the residents of the island. The *Jones Act* also included two additional exceptions. Puerto Ricans and “aliens” alike could chose to hold on to their citizenship. According to most estimates just under 300 residents chose to retain their Puerto Rican citizenship. In addition, the *Jones Act* provided that the native-born children of alien parents who were permanently residing in Puerto Rico could declare their intention to become citizens within one year of reaching a majority of age. For many reasons, thousands of Puerto Ricans failed to declare their intention to become citizens and became undocumented residents of the island.

Soon after both the United States District Court for the island and the Puerto Rican Supreme Court addressed the question of whether the extension of citizenship to Puerto Ricans under the terms of the *Jones Act* had incorporated the Puerto Rican territory. In the first instance the District Court argued that a citizen charged with committing a homicide after the passage of the *Jones Act* could not be brought to trial without a grand jury indictment as required by the Fifth Amendment. In the latter case, the defendant had committed a murder prior to the enactment of the organic act, but his prosecution began after enactment of the *Jones Act*. In this case,

the Puerto Rican Supreme Court held that an indictment was not required after the passage of the *Jones Act*. In *People of Porto Rico v. Tapia* the United States Supreme Court reversed the U.S. District Court and in *People v. Muratti* [245 U. S. 639 (1918)] the Court affirmed the Puerto Rican Supreme Court without providing any substantive comments. The Supreme Court's ruling rejected the idea that extending citizenship to Puerto Ricans had both extended the bill of rights to the Puerto Rico and had changed the island's territorial status.

Four years later the Supreme Court again addressed the question of whether the naturalization of Puerto Ricans had changed the territorial status of Puerto Rico in *Balzac v. People of Porto Rico* [258 U.S. 298 (1922)]. On April 16 and 23 of 1918, Jesús M. Balzac, the editor of a local Puerto Rican newspaper *El Baluarte*, published two articles impugning the violence committed by the local territorial government on Puerto Ricans. Mr. Balzac was charged with several counts of criminal libel and was promptly prosecuted. During his trials, Mr. Balzac claimed that his publications were fair comments against a public official and these should be protected under the free speech provisions the First Amendment. Mr. Balzac also argued that since he was facing felonious charges, he should be entitled to a citizen's right to trial by jury. The Supreme Court rejected the argument that Mr. Balzac was entitled to either a Six or Seventh Amendment right to trial by jury.

In this important ruling, Chief Justice William H. Taft argued that the extension of citizenship to Puerto Rico did not mean that Congress had incorporated the island as a territory. It followed that the United States did not have to treat Puerto Rico as a part of the United States for constitutional purposes. The Chief Justice offered several important explanations that continue to inform the present debates over the constitutional status of Puerto Rico and persons born in the island. On the question of the territorial status, the Chief justice argued that the *Jones Act* did not contain a provision that expressly and unequivocally incorporated the Puerto Rican territory. In the absence of a congressional act expressly incorporating the Puerto Rican territory, citizens residing in the island were only entitled to

fundamental rights or constitutional rights extended to the island by acts of Congress. The Supreme Court reasoned that the status of the island (locality) would determine what rights were applicable to Puerto Rico and the U.S. citizens residing in the island. In addition, the Court noted that Puerto Ricans were also culturally unable to understand the responsibilities of the jury system because they were predominantly educated in a Spanish legal system. Congress has never passed legislation to incorporate Puerto Rico and U.S. citizens residing in the island are not constitutionally entitled to a Six or Seventh Amendment right to trial by jury.

Even though the *Jones Act* collectively naturalized Puerto Ricans, the citizenship that this act extended to the island required that the native-born children of “alien” parents declare their intention to become citizens within one year of reaching the age of majority. For numerous reasons, thousands of Puerto Ricans neglected to register within the allotted period of time and became undocumented. In an effort to fix this problem Congress amendment Section 5 of the *Jones Act* at least three times, in 1927 (Section 5a)[64 Stat. 319], in 1934 (Section 5b) [48 Stat. 1245], and in 1938 (Section 5c) [52 Stat. 377 (1938)]. In each of these instances Congress attempted to correct this problem by creating opportunities for Puerto Ricans that could demonstrate their native-birth to become naturalized citizens of the United States.

By the late 1930s the number of undocumented Puerto Ricans was estimated to have reached upwards of 6,000. Finally in 1940 Congress enacted new corrective legislation that sought to resolve the continuing growth of this undocumented population in Puerto Rico with the enactment of the *Nationality Act of 1940* [54 Stat. 1137 (1940)]. This legislation included specific provisions that retroactively naturalized all persons born in Puerto Rico after April 11, 1899 and extended birthright or *jus soli* citizenship to all persons born in the island after 1941. For the purposes of this act, Puerto Rico was distinguished from other outlying or unincorporated territories and became a geographical part of the United States (Section 101d). In addition, Section 202 extended birthright or *jus soli* citizenship to

all persons born in the island without any restrictions. This law was subsequently codified in 1952 [8 U.S.C. §1402, 66 Stat. 236 (1952)] and remains the main source of U.S. citizenship for all persons born in Puerto Rico.

Persons born in Puerto Rico after 1941 are presently entitled to acquire a form of birthright or *jus soli* citizenship. The question however is whether the extension of birthright citizenship without explicitly changing the unincorporated territorial status of the island guarantees that persons born in Puerto Rico can be entitled to a constitutional (14th Amendment) form of birthright citizenship, a form of *jus soli* citizenship that extends to the children of citizens or undocumented migrants alike that are born in the United States. Most policymakers and academics suggest that Congress merely extended a *statutory* or legislative form of birthright citizenship to the island because Congress has never explicitly recognized the extension of the 14th Amendment to Puerto Rico. Alternatively, others argue that in order to extend *jus soli* citizenship to the island the Federal government had to treat Puerto Rico as an incorporated territory of the United States. This latter argument suggests that Congress can selectively incorporate Puerto Ricans for citizenship purposes without having to change the island's political status. Suffice it to say that this is an open question that has been lingering for more than half a century.

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Appendix A: Status of Persons Born in Puerto Rico Since 1898

Legislation/Action	Dates	Type of Citizenship
Military Occupation	July 25, 1898-April 11, 1899	Spanish Nationals
Ratification of Treaty of Paris	April 11, 1899-Present	U.S. Nationals
Foraker Act of 1900	May 1, 1900-Present	Puerto Rican Citizenship
Jones Act of 1917	March 2, 1917- 1950	Parental or <i>Jus Sanguinis</i> Citizenship
Nationality Act of 1940	January 13, 1941-June 27, 1952	Birthright or <i>Jus Soli</i> Citizenship
8 U.S.C. §1402 (1952)	June 27, 1952-Present	Codified Birthright Citizenship of NA of 1940